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No. 88-1148

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOHNNY S. SHORT,
Cross-Petitioner,

v.

KIAMICHI AREA VOCATIONAL-TECHNICAL
SCHOOL DISTRICT NO. 7,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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QUESTION PRESENTED

Under the Supremacy Clauce of Article VI of the United States Constitution, does this Court's March 19, 1985 decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), that a public school employee with a property interest in continued employment be afforded a pretermination hearing, apply to Cross-Respondent School District's April 2, 1985 decision to terminate Cross-Petitioner's employment, notwithstanding the fact that "the school board may not have known" about *Loudermill* when it took the action in question?

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Constitutional Provision

Art. VI 2

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Cross-Petitioner, Johnny S. Short, respectfully prays that if this Court grants the December 12, 1988 Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma filed by the Kiamichi Area Vocational-Technical School District No. 7 ("School District Petition") to review a portion of the opinion of the Oklahoma Supreme Court in this case,[1] it also grant this Cross-Petition to review the portion of the opinion in which the Oklahoma Supreme Court declined to apply this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), on the ground that the School District "may not have known [of the holding in *Loudermill*] that a pretermination hearing was required to comport with procedural due process," *Short v. Kiamichi Area Vocational-Technical School District No.*

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[1] *Kiamichi Area Vocational-Technical School District No. 7 v. Johnny S. Short*, No. 88-974 (filed December 12, 1988).

7, 761 P.2d 472, 478 (1988), App. A, 12a.[2] when, some two weeks after issuance of the decision in *Loudermill*, it terminated Cross-Petitioner's employment.

OPINIONS BELOW

The opinions of the courts below are set forth in the Appendices to the School District Petition.

JURISDICTION

The Supreme Court of Oklahoma entered judgment on July 19, 1988, and on September 13, 1988, denied petitions for rehearing filed by both parties. The School District Petition was timely filed with this Court. Counsel for Cross-Petitioner received the School District Petition on December 12, 1988, and is filing this Cross-Petition for Writ of Certiorari within the time permitted by Supreme Court Rules 19.5 and 20. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Article VI of the United States Constitution provides, in pertinent part, as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

STATEMENT OF THE CASE

On March 19, 1985, this Court issued its decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, holding that, under the due process clause

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[2] References herein to "App. A" are to Appendix A of the School District Petition.

of the 14th Amendment, a public school employee with a property interest in continued employment must be afforded a pretermination hearing. Some two weeks later, on April 2, 1985, the Kiamichi Area Vocational-Technical School District No. 7 ("School District") notified Cross-Petitioner, Johnny S. Short, a tenured teacher, that he was being nonrenewed. The School District did not provide Short with any opportunity to be heard prior to making its nonrenewal decision, and Short instituted proceedings in the Oklahoma state court, contending, *inter alia*, that he had been denied procedural due process. The Oklahoma Supreme Court agreed, holding that the procedure followed with regard to Short's termination "falls short of the *Loudermill* standard." 761 P.2d at 477; App. A at 8a.

Turning to remedy, the Oklahoma Supreme Court observed that "[i]t remains for us to determine whether a *Loudermill* hearing should be afforded full retroactive effect, purely prospective effect, or retroactively limited to this case." *Id.* at 478; App. A at 12a. After citing this Court's decisions in *Linkletter v. Walker*, 381 U.S. 618, 628-29 (1965) and *Great Northern Railroad Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-65 (1932), for the proposition that "state courts are free to determine, as a matter of policy, the effective date of new rulings, *id.*, and making reference to the factors set forth by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for determining whether judicial decisions should be given retroactive effect, the Oklahoma Supreme Court stated:

> At the time Short's contract was nonrenewed, *Loudermill* had been promulgated for only two weeks. Therefore, the school board may not have known that a pretermination hearing was required to comport with procedural due process. . . . . *Id.* at 478; App. A at 12a.

Accordingly, despite its finding that Short had not received the pretermination hearing to which he was en-

titled under *Loudermill*, the Oklahoma Supreme Court denied him any relief. The court concluded that its "pronouncement [regarding the due process requirements of *Loudermill* would] be given purely prospective effect," and would apply only to "termination or nonrenewal cases involving tenured teachers occurring after the mandate herein is issued." *Id.* at 479; App. A at 13a.[3]

REASONS FOR GRANTING THE CROSS-PETITION

I. The Oklahoma Supreme Court's Refusal to Apply a Decision of this Court to an Action Taken By the School District After the Issuance of the Decision on the ground that the School District may not have known about the Decision violates the Supremacy Clause.

Because the Oklahoma Supreme Court talked in terms of the "retroactive effect" of *Loudermill*, it is important at the outset to make clear what is and is not at issue here. This case does *not* involve the retroactive application of a decision of this Court, and, accordingly, the Oklahoma Supreme Court's reliance on *Linkletter v. Walker*, *Great Northern Ry. v. Sunburst Oil & Refining Co.*, and *Chevron Oil Co. v. Huson* is misplaced. These cases all involved the effect of a decision of this Court on cases that were pending at the time of, or had gone to final judgment prior to, its issuance. The common thread in the above cases, and indeed in all of this Court's other cases involving the nonretroactive applica-

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[3] The underlying federal question raised in this case—*i.e.*, whether Short is entitled under *Loudermill* to a pretermination hearing—was raised in the appeal of his termination that Short filed in the District Court in and for Choctaw County, Oklahoma. The specific federal question raised in this Cross-Petition—*i.e.*, whether the Oklahoma Supreme Court erred in refusing to apply this Court's March 19, 1985 decision in *Loudermill* to the April 2, 1985 decision to terminate Short's employment—initially surfaced in the opinion of the Oklahoma Supreme Court and was raised by Short in the Petition for Rehearing that he filed with that court.

tion of judicial decisions, is that the challenged action occurred *before* the issuance of the decision that established the new principle of law. In observing that "a decision of this Court could produce substantial inequitable results if applied retroactively," *Chevron Oil Co. v. Huson*, 404 U.S. at 107, this Court has emphasized that the challenged action occurred before the decision in question, and noted that "[t]he most . . . [a party] could do was rely on the law as it then was." *Id.*

The situation in the instant case is totally different, and does not in any sense present the type of reliance found in cases involving the nonretroactive application of a judicial decision. The decision in *Loudermill* was issued on March 19, 1985, and the School District did not make its decision to terminate Short's employment until April 2, 1985, some two weeks later. Thus, when the School District took the action in question, *Loudermill* represented "the law as it then was." *Chevron, supra.* Accordingly, the issue here is *not* the retroactive application of *Loudermill*, but whether, under the Supremacy Clause of Article VI of the Constitution, this Court's holding in that case must be obeyed. It scarcely warrants extended discussion to demonstrate that the answer is yes. As this Court observed in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

> Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.

See also, e.g., Henry v. City of Little Rock, 376 U.S. 776, 777, n* (1964) ("[A] rule based upon the Constitution of the United States . . ., under the Supremacy Clause, is binding upon the state courts as well as upon federal courts."); *Sims v. State of Georgia*, 385 U.S. 538, 544 (1967).

The interpretation of the due process clause of the Fourteenth Amendment enunciated by this Court in *Loudermill* became the Supreme Law of the Land on March 19, 1985, and under the Supremacy Clause of Article VI of the Constitution it was from that point on binding on the School District. We find nothing in any decision of this Court, or in any theory of constitutional jurisprudence, to suggest that there is some "grace period" before the Supremacy Clause takes hold because "the school board may not have known" of a constitutional rule that previously was announced by this Court.

The Oklahoma Supreme Court's unjustified refusal to apply the Supreme Law of the Land as declared by this Court in *Loudermill* warrants the granting of this Cross-Petition.

II. If this Court Grants the School District Petition, But Does Not Grant this Cross-Petition, the Respondent to the School District Petition would Have No Practical Interest in the Case.

As noted, the Oklahoma Supreme Court held that the procedure followed by the School District in terminating Short's employment "falls short of the *Loudermill* standard", 761 P.2d at 477; App. A at 8a. But, because it gave this holding "purely prospective effect," *id.* at 479, App. A at 13a, the court awarded no relief to Short. Although, for the reasons set forth in this Cross-Petition, the latter aspect of the Oklahoma Supreme Court's decision is patently incorrect, Short did not wish to continue this litigation and, accordingly, did not file a petition for a writ of certiorari in the first instance. This remains Short's preferred position, and

he, therefore, urges this Court to deny the School District Petition,[4] which would in turn preclude the granting of this Cross-Petition, *see* Supreme Court Rule 20.5, thereby bringing this litigation to a close.

If this Court were to grant the School District Petition, but to deny this Cross-Petition, the situation would be anomalous indeed. Although Short believes that the position taken by the Oklahoma Supreme Court with regard to the due process requirements of *Loudermill* is correct, he would have no practical interest in defending that position before this Court, inasmuch as an affirmance would still leave him without any relief. If this Court grants the School District Petition, Short can obtain relief in this case *only* if this Court (1) sustains the position taken by the Oklahoma Supreme Court with regard to *Loudermill*, (2) grants this Cross-Petition, and (3) reverses the position taken by the Oklahoma Supreme Court with regard to the application of *Loudermill* to the termination of Short's employment. The denial of this Cross-Petition, therefore, would mean that Short, who is the only respondent to the School District Petition, would have no practical interest in the question presented by that Petition. A situation in which only one party has an interest in a case before this Court is plainly to be avoided, and, if the School District Petition is granted, this can be done only by also granting this Cross-Petition.

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[4] The grounds for denying the School District Petition will be set forth in the Brief in Opposition to that Petition which Short will file with this Court.

CONCLUSION

For the foregoing reasons, if this Court grants the School District Petition, it also should grant this Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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PROSPECTIVE APPLICATION OF THE COURT'S JUDGMENT BELOW IS BASED UPON FACTORS RECOGNIZED AND APPROVED BY THIS COURT AND IS NOT VIOLATIVE OF THE SUPREMACY CLAUSE.

Statutory or judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins a decision recognizing the doctrine of nonretroactivity. *Lemon v. Kurtzman,* 411 U.S. 192, 199 (1973). A statute which is later

declared unconstitutional is not absolutely void, but is a practical reality upon which people rely, and courts recognize that reality until that statute is found to be unconstitutional. State officials, including school boards of education, have a duty and are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful. *Id.* at 209.

Unquestionably, the Board of Education of Kiamichi Area Vocational-Technical School District No. 7 (hereinafter "School Board") relied upon the Oklahoma teacher termination statutes, particularly Okla. Stat. tit. 70, §6-103.4(B) (1981), in full force and effect on April 2, 1985, when the decision was made to non-renew Mr. Short's teaching contract. At that time, the statute had not been subjected to constitutional scrutiny, but did define the procedures for boards of education and administrative personnel to follow in teacher non-renewal and termination proceedings. That particular statute was not ruled unconstitutional until July 19, 1988, when the Oklahoma Supreme Court, in a split decision, handed down its opinion in *Short v. Kiamichi Area Vocational-Technical School District No. 7 of Choctaw County,* 761 P.2d 472 (Okl. 1988), and then denied rehearing on September 13, 1988. The determination that the Oklahoma statute would not pass constitutional muster based upon this Court's decision in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), was made more than three years after the School Board's decision affecting Short. In declaring this statute unconstitutional, the Oklahoma Supreme Court determined that its holding was to be applied prospectively only, after

considering the factors critical in making such a determination as enunciated in *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971).

Mr. Short now argues that the prospective effect given the decision is in violation of the Supremacy Clause in that this Court's decision in *Loudermill,* affording public employees a pre-termination hearing, was promulgated two weeks prior to the School Board's decision to non-renew Short's contract. While superficially appealing, this argument cannot survive close analysis as it overlooks basic principles and equities which this Court has long recognized.

A court is to apply the law in effect at the time of its decision. *Bradley v. School Board of City of Richmond,* 416 U.S. 696 (1974). While the School Board respectfully submits that the Oklahoma Supreme Court misapplied the *Loudermill* decision as set forth in its Petition for Certiorari filed December 12, 1988, U.S. Supreme Court case 88-974, the School Board nevertheless acknowledges the Oklahoma Supreme Court recognized the factors pertinent to its consideration of the effect of its decision — to declare in 1988 the 1981 Oklahoma statute unconstitutional. It is for the court to determine whether a state statute is constitutional or unconstitutional upon its consideration of recent decisions of the United States Supreme Court — not a state school board.

Here, the School Board was required to follow the laws and procedures as provided by the Oklahoma Legislature in effect at the time the action took place. Short does not now contend the Board did not follow the Oklahoma law in effect in 1985.

The *Loudermill* decision related to an Ohio statute which allowed termination *before* a due process hearing and *without* pay. The Oklahoma statute, Okla. Stat. tit. 70, §6-103.4(B)(1981) provided for *continued pay and benefits* (continued property interest) during the full due process hearing before a hearing panel and *before* termination and loss of pay, if any, would take effect.

Contrary to Short's claim, *before* Short was terminated, this Court's decision in *Loudermill* was specifically brought to the attention of the due process hearing panel and the panel determined that *Loudermill* "*does not* apply" because of the material differences between the Ohio statute in *Loudermill* and the subject Oklahoma statutes which the School Board and hearing panel were obliged to follow.[1] This finding and Order of the hearing panel was then approved by the Oklahoma State District Court[2] before Short's appeal to the Oklahoma Supreme Court.

Short's argument in essence demands that boards of education be clairvoyant. Not only does Short insist that boards of education, comprised of laypeople, be cognizant of very recent United States Supreme Court decisions, but additionally would require those laypeople to anticipate that the decision would then be interpreted by a state court to hold a statute unconstitutional. The unreasonableness of this position is patently clear. As Justice Powell pointed out in his concurring and dissenting

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[1] Petition for Certiorari, U.S. Supreme Court, Case Number 88-974, Appendix C, III, Conclusions of Law, para. 3.

[2] Petition for Certiorari, U.S. Supreme Court, Case Number 88-974, Appendix B, Decision of District Court of Choctaw County, Oklahoma.

opinion in *Wood v. Strickland,* 420 U.S. 308, 329 (1975), a case involving an action of an Arkansas school board, it is probably too much to expect that local officials will know what the law is relative to constitutional rights since the courts are not, by any means, in unanimous agreement in this respect. While *Wood* addressed the issue of qualified immunity and what are "clearly established" constitutional rights, Justice Powell said:

> The court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights . . . one need only to look to the decisions of this court — to our reversal, our recognition of evolving concepts, and our five-to-four splits — to recognize the hazards of even informed prophecy as to what are 'questioned constitutional rights.'

Even the majority in *Wood* did not charge school board members with "predicting the future course of constitutional law." *Id.* at 322.

Here, the Oklahoma Supreme Court did not unanimously agree upon the application of *Loudermill* to Oklahoma's Teacher Termination Statute. Justice Simms in a strongly worded dissent found the majority's reliance on *Loudermill* to be misplaced as that action was clearly distinguishable and not controlling. The School Board had no "clear warning" that it was voyaging into a potentially unconstitutional arena when the decision was made to non-renew Short's contract, pursuant to Okla. Stat. tit. 70, §6-103.4(B)(1981). Two weeks after this Court's

decision in *Loudermill,* it could not be foretold that that decision would ultimately render Oklahoma's teacher termination statute unconstitutional, and that the School Board's reliance on that statute was unjustified.

In *Lemon v. Kurtzman,* 411 U.S. at 207, this Court noted succinctly — governments must act if they are to fulfill their high responsibilities. The Court would not hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. This type of position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers have the power to carry forward the directives of the state legislature. ". . . One of the first principles of constitutional adjudication is the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, at 60 (1973) (Stewart, J., concurring). *Id.* at 208. State officials, particularly boards of education comprised of volunteer laypeople, should be entitled to rely on a presumptively valid state statute, until adjudicated otherwise.

The Oklahoma Supreme Court acknowledged that once it determined due process required tenured teachers facing either termination or non-renewal be afforded a pretermination opportunity to be heard, it must also determine the effect of that ruling. The Constitution neither prohibits nor requires that retrospective effect be given to any new constitutional rule. The

federal Constitution has no voice upon the subject of retrospectivity. Courts are free to determine, as a matter of policy, the effective date of new rulings. *Linkletter v. Walker,* 381 U.S. 618 (1965); *Great Northern Railroad Company v. Sunburst Oil and Refining Company,* 287 U.S. 358 (1932).

The Oklahoma Supreme Court in determining the application of its ruling analyzed and applied the factors listed in *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971). These include: (1) the purpose of the new rule, (2) the extent of reliance on old doctrine; and (3) the burden likely to be imposed on administering legal process due to additional litigation or curative actions. After a careful weighing of the three factors of purpose, reliance, and burden, the Oklahoma Supreme Court determined that its ruling should be given prospective effect only to all cases occurring after the mandate was issued.

This doctrine of nonretroactivity serves to reconcile legal interest in a new rule of law with a reliance interest founded upon a pre-existing rule of law. *Wainwright v. Stone,* 414 U.S. 21 (1973). In appropriate cases, a court may in the interest of justice make a rule prospective, and there is much to be said in favor of such rule for cases arising in the future. *Linkletter v. Walker,* 381 U.S. 618 (1965).

While the School Board contends the Oklahoma Supreme Court's decision applies *Loudermill* incorrectly, the prospective effect of that decision is proper, if it is upheld. Yet Short now

contends in his Cross-Petition for Certiorari that application of the Oklahoma Supreme Court's pronouncement is incorrect, and that it must be made retroactive, at least as to him, as only then can he have any prospect for relief.

With any ruling made effective prospectively only, the new ruling does not apply even to the parties before the court. That fact alone is insufficient to divest a court of jurisdiction and is not adequate grounds to grant certiorari. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964). The fact the ruling is given prospective effect does not mandate a certain grant of certiorari on the matter.

CONCLUSION

Short's argument that the Oklahoma Supreme Court's determination that its decision is to be applied to future cases only is a violation of the Supremacy Clause is ill-founded. The Kiamichi School District and Board of Education could not have anticipated that the two week old ruling in *Loudermill* would ultimately be interpreted to render the state statute upon which they relied unconstitutional. The state officials were entitled to rely on the presumptively valid statute. Any other decision would render officials paralyzed while duly enacted legislation awaits favorable judicial countenance. Fault, if any, may be found in proceedings conducted in adherence to that statute alone only *after* the Oklahoma Supreme Court's mandate has issued.

For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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